UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EVAN BRIAN HAAS,	)	**CASE NO: 16-03175**
	)	**ADVERSARY**
Plaintiff,	)	
	)	**Houston, Texas**
vs.	)	
	)	**Monday, March 5, 2018**
NAVIENT, INC, ET AL,	)	
	)	**(3:28 p.m. to 4:20 p.m.)**
Defendants.	)	

MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE DAVID R. JONES,
UNITED STATES BANKRUPTCY JUDGE

Appearances:	**See page 2**
Court Reporter:	**Recorded; FTR**
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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

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Houston, Texas; Monday, March 5, 2018; 3:28 p.m.

(Call to order)

(Hearing already in progress)

THE COURT: -- 3175, *Haas versus Navient*.

MR. FARRELL: Judge, our adversaries were not right out there in the hall. You want to go see if I can find them?

THE COURT: Yes, I greatly appreciate that. Hopefully they won't be far.

(Pause from 3:28 p.m. to 3:29 p.m.)

MR. FARRELL: Your Honor, they are not out there. They -- I saw them get in the elevator when we took the last break but I don't know which direction they went.

THE COURT: Got it, thank you. Best laid plans, I suppose.

MR. FARRELL: But I'm sure they'll be right here.

THE COURT: Oh, they went to the library? All right, okay, got it. Hopefully it won't be long.

(Pause from 3:29 p.m. to 3:30 p.m.)

MR. SPEAKER: Thank you, your Honor.

THE COURT: Certainly. All right, --

MR. SPEAKER: Sorry, your Honor (indisc.)

THE COURT: I -- it -- you're not late, it's exactly 3:30. So called the case. If you'd just go ahead and make your appearances, please. Mr. Farrell, we'll start with you.

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MR. FARRELL: Your Honor, Tom Farrell, my partner, Beth Sieg, is with me here for the Navient defendants.

THE COURT: All right, thank you, good afternoon.

MR. BURGE: Your Honor, Jason Burge here representing interim class counsel in the punitive class. We have Marc Myers, Lynn Swanson, Cathy Johnson (phonetic), and Adam Corral.

THE COURT: All right, thank you. Good afternoon, everyone.

MS. SPEAKER: Good afternoon.

THE COURT: All right, Mr. Farrell, your motion for summary judgment. And you can assume I've had opportunity to read both the motion, think about it; I've read the response, I've read the reply. If it's in the pleadings, I think I got it. But if there's something you want me to know or you think that I'm -- as I'm sure I will make comments along the way, happy to revisit anything. But I have read what's in the papers.

MR. FARRELL: I assumed as much, your Honor, therefore I will not repeat what's in the papers. I think the first thing I did want to address though up front is sort of why now, why are we raising this issue now in the form of a summary judgment when we have class certification briefing ongoing and --

THE COURT: That's a cost issue, I get all of that.

MR. FARRELL: Yeah, --

THE COURT: I wasn't bothered by that. What I was bothered by more than anything was the statement that there was still needed discovery and that there had been -- and, again, I don't have a motion regarding this in front of me, but there had -- the suggestion was made that there'd been resistance to needed discovery. And the question that I really want to ask -- and I know you filed a reply that said, they got everything they need, we're ready now. Is there a genuine dispute that we can have constructive, real, fully briefed, fully educated argument on the motion for summary judgment, or is there a genuine belief that there is something out there that is still needed that would affect the outcome of this summary judgment?

MR. FARRELL: Well, your Honor, from my perspective, the answer is we're ready to go, we think it's ripe. And I would note that they did raise, you know, a 56(d) motion -- or argument in their papers, but it's unaccompanied by any affidavit that identifies --

THE COURT: No, I got that. And --

MR. FARRELL: -- what additional discovery is necessary.

THE COURT: -- I'm aware of that issue which is why I was trying to figure out if this was a placeholder, if you all were working through something and there was an expectation that something was coming, or if this is a real issue that I need to be worried about.

MR. FARRELL: From my perspective, it's a real issue. We think that the discovery that's been going back --

THE COURT: I'm sorry, you don't think it's a real issue because you said you're ready to go, right? I meant whether or not there's any --

MR. FARRELL: It's a ripe issue --

THE COURT: A ripe issue.

MR. FARRELL: -- that on which no further discovery is going to shed any light.

THE COURT: All right.

MR. FARRELL: When they filed their reply -- their response, we were in some back and forth meet-and-confer on discovery. That discovery really goes to the certification issues. Since then, we've produced a bunch more stuff. They've made a trip to Navient, gotten in a clean room, and looked at computer files. We've had some depositions. And all of that, though, in our judgment goes to --

THE COURT: Certification.

MR. FARRELL: -- certification issues. We think from a factual standpoint on the two named Plaintiffs -- and I know the Court has just --

THE COURT: On the 3rd.

MR. FARRELL: -- added leave to add --

THE COURT: Right.

MR. FARRELL: -- two more, but for the two that are

the focus of this motion, the only facts that are necessary are their promissory notes, which set forth the purposes of their loans, their schedules in bankruptcy which describe their loans, their discharge orders, and their discovery responses where they admit the purpose for which the loans were taken.

THE COURT: Let me bring up an issue that you both tend to do, but I want at least give you sort of my view of the world. You both treat a discharge order and the discharge injunction as interchangeable. And I will tell you both, that's just not true. And so I don't know if that changes your arguments at all. You know, in this district, we have a standard form order that is a one-liner. It says the debtor is entitled to a discharge. I mean, that's exactly what it says. And it is I think signed -- always signed by a judge. That may not be the entirety of the case. There are certain districts around the country where discharge orders are actually signed by the clerk. And it -- 524 then says that a discharge then triggers all of the following entitlements under 524. And so I just want both of you to know, because you both do it at various times, that a discharge order and the discharge injunction are not synonymous and they are not interchangeable. And so I just -- it seems to me that that does affect the argument. But I want you to -- I want you both to know that's a nuance that I have trouble getting over because when I see you both do it, I go -- I stop and put a sticky on it that

says, this is just not right. And so I -- again, you don't need to respond to it, but I want you both to know that I do see a very big difference. I certainly think Judge Isgur sees a very big difference. And I think it drives the outcome in his opinions. I don't know that it drives the outcome in this one. But I just want you to know that I draw that very big distinction in terms of the difference between a discharge order and the statutory discharge injunction under 524.

MR. FARRELL: I appreciate that, your Honor. I think to the extent that implicates or affects the argument at all, it affects only the jurisdictional argument regarding --

THE COURT: Agreed.

MR. FARRELL: I don't think it affects the basic statutory interpretation argument.

THE COURT: I absolutely agree with you.

MR. FARRELL: And frankly, Judge, what we're trying to do here, I mean, it's no secret. I mean, I'm going to stand up here and tell you what I think the statute means. Jason's going to stand up and tell you what he thinks it means. And frankly what I think and what he thinks doesn't matter. This is an issue --

THE COURT: Well, of course it does.

MR. FARRELL: -- that needs to get resolved at a -- at the level of the higher court because, you know, bankruptcy courts, as you've seen in the papers, are on different sides of

this across the country.

THE COURT: Sure.

MR. FARRELL: And, you know, our goal is to tee this up in a way where we can get that issue decided once and for all. And given the agreed-order that we did after one of the last hearings we were at where we stayed -- stopped collection efforts, you know, there's no incremental harm or damage to be -- being doing to anybody while we get this sorted out. And so our goal was to try and get it sorted out.

THE COURT: Sure. So let me ask you this. And take out of the equation -- and, I mean, I certainly want you to make your record and I certainly want you to address all of the issues that you think need to be addressed. I'm not trying to shortcut anything. What I want -- I mean, in looking at the arguments, the jurisdictional argument I just don't follow. I have been a big believer since the day that Judge Isgur issued the *Cano* decision. I think he got it right. And it all comes back to the difference between a discharge order and the statutory discharge injunction. I agree with the concept that if I were to sign an injunction in a piece of litigation, I a hundred percent agree with the suggestion that only I can enforce that injunction and it should come back to me; because as you rightfully point out, in issuing that injunction, you know, only I know what was going on inside my head at the time I issued it, what motivated me to grant that form of equitable

relief. But the statutory discharge injunction, it is just a much different creature. It goes to the very core of the bankruptcy process. And so the jurisdictional argument I'm not persuaded by. And I -- again, I -- you know, I understand why you make it. I want you -- if you think you need to do something more to preserve that issue, I want you to do it.

With respect to the statutory interpretation question, let me ask you, are you contemplating seeking an expedited or direct appeal of that issue, either one of you, if you were to come out on the short end of that? What is the -- if you don't mind me asking, what's the goal? Because I want to make sure I get this. If you're going to try to do this on -- you know, if you're going to try to stop, go get some relief, and come back, I want to do everything I can do to accommodate that review process.

MR. FARRELL: With all candor, Judge, that is our goal. If you were to rule against us on the statutory interpretation, we would in all likelihood ask the Court to give a 1292(b), interlocutory appeal, defer the class certification issues --

THE COURT: Right.

MR. FARRELL: -- until that is resolved.

THE COURT: I got that issue. In that case -- and I appreciate you being candid. And I want to expedite that process for either one of you, because I assume that the

Plaintiffs would as well if you came up on the wrong end of that.

MR. BURGE: I would say I don't have any objection or, you know, I suppose I hadn't given this a whole lot of thought because Tom hadn't brought it up prior to us being here today.

THE COURT: Sure.

MR. BURGE: I don't have any objection to getting the issue in front of a higher court. I think eventually it's going to have to be in front of a higher court. And I think in terms of resolving this case would help us if we could get -- you know, if we weren't -- if we had a sense of what the appellate court was going to do so we wouldn't --

THE COURT: Right, so --

MR. BURGE: So I would be nervous about staying the case because I do think -- I don't -- not sure I agree with Tom that the agreed-order has resolved all of the implications for class members. We've heard from class members, including our class rep, that the -- you know, these loans still have an effect on their credit even if Navient isn't actually collecting them. And so I think -- you know, I hesitate to agree to a complete stay and shut down class certification for the Fifth Circuit to decide this case. I mean, even if we do a 1292(b), they could always turn it down and then we've --

THE COURT: Well, here's --

MR. BURGE: -- kicked the can who knows how far down the road.

THE COURT: Right. Here's my view of the most efficient way. I've thought a lot about this if you haven't figured that out. I may be wrong about so many things but I've thought about it a lot, is that if a party was going to appeal the issue regarding the statutory interpretation question, it would seem to me that I can immediately certify that for direct appeal to the Fifth Circuit; because I agree quite honestly not only in this case but this interpretation question comes up a lot. And it would be nice to have something nice, succinct, on the point, not driven by something else, but only on this issue. And so my thought would be is that if I certified it for a direct appeal, is that I would stay everything sufficient to allow the losing party to go to the Fifth Circuit and seek a stay. Obviously if the circuit stayed it, then the answer is -- I mean, there isn't going to be any decision by me that would change that. If the circuit refused the direct appeal, which it certainly has the right to do, the I think that that would dictate a different set of results. I also think that a decision to deny motion to stay by the circuit would send a message not to me as to the merits of what they thought but as to what they expected to occur in the litigation. So that's actually my thought. Because I agree with you, I don't want to go through a long, drawn out, complicated certification hearing

if I turn out to be wrong on this issue. Or I don't want the certification to fall apart because I got it wrong from the Plaintiffs' point of view. I just -- to me, it just made sense. Any -- either one of you have a reaction to that?

MR. FARRELL: That was our thought when we filed the motion, Judge. And, you know, we didn't put explicitly in papers that was the plan, but I came here today planning to tell you --

THE COURT: Sure.

MR. FARRELL: -- exactly what I told you. So we think that makes sense.

THE COURT: All right. So what -- you agree?

MR. BURGE: And, I mean, my only concern is that I think that, you know, deferring time does harm to this class. But I -- you know, I think --

THE COURT: How so?

MR. BURGE: Well, only because our class members, these debts, the ones that are at issue in this case, it is true that they are no longer getting discharge violations --

THE COURT: Right.

MR. BURGE: -- from what the reports we're hearing. But these debts are still on their credit reports, they're still impacting their access to credit. It's still causing problems for them as they move forward because these debts have not formally been recognized as discharged by Navient. I agree

it is a less pressing damage than if they were getting called --

THE COURT: But isn't that --

MR. BURGE: -- two to eight times a day.

THE COURT: -- something that could just be dealt with ultimately in the damage model?

MR. FARRELL: I think it could. And, Judge, one thing, you know, when we entered into the agreed order, we agreed that we would stop collection efforts. It was not part of the agreement that we would stop the accrual of interest in the time period. But as a practical matter, we have.

THE COURT: Right.

MR. FARRELL: So interest is not accruing now at this point. So the only conceivable issue is the credit issue. And I think that does get addressed down the road.

THE COURT: Yeah, I just think that that's a remedy. I mean, it could turn out to be incredibly harsh if it turns out that Navient was wrong. And if Navient was right, then there is no harm. So I get all of that. Then what I'd like to do, Mr. Farrell, given that that's -- I want you to make whatever jurisdictional argument that you feel like you need to make. But after having read everything, having done my own research, I've told you where I'm going.

MR. FARRELL: Right.

THE COURT: And I -- you know, I'm happy to hear.

You know, you've changed my mind before and I certainly want you to have the opportunity. But I very much want, so that there is a complete, accurate, full transcript -- because the Circuit's going to get this. And to the extent that a district court is one step removed from bankruptcy proceedings, a circuit court is multiple steps removed. And so I want you to make, even if it's repetitious, I want you to make your statutory interpretation argument as complete as you would if you thought that I'd never read anything. And same for the Plaintiffs. Just so that there is a complete, robust argument of the issue that again either one of you might seek to take up.

MR. FARRELL: Sure.

THE COURT: All right? All right.

MR. FARRELL: In light of that, your Honor, I'm not going to say much about jurisdiction then. We obviously know the *Cano* case is out there. We respectfully disagree with it.

THE COURT: Understood.

MR. FARRELL: But all the bases we have for disagreeing with it are in the papers and so I'm not -- there's really nothing further to add on the jurisdictional piece.

On the statutory interpretation question, it's pretty simple from our standpoint. We believe 823 -- excuse me, 523(a)(8)(2), the educational benefit section, is plain on its face. And that the various cases that we've cited -- and, you

know, we can argue I suppose on who's counting the cases right and whether our view is the majority view or the minority view. I don't think that advances the ball any. The cases are out there.

THE COURT: I agree.

MR. FARRELL: They say what they say; although we do have the majority. But all kidding aside, we think those cases get it right.

THE COURT: Right.

MR. FARRELL: And the statute on its face is plain. And because it's plain and because it covers the kinds of debts at issue here, there is no need to get to the legislative history argument, there is no need to get to the canon of construction argument. The -- I can't even pronounce it but you -- the canon that the Plaintiffs have relied on, you simply don't get there and that --

THE COURT: So let me ask you thinks because, you know, bankruptcy lawyers tend to proceed along a very predictable sequential path. Is anytime we have a term, if you will, and we're trying to figure out what it means, first thing we do is we go to 101 and we look for in the definitions under the Bankruptcy Code for a definition of that particular term. And if we look under 101, I'm not aware of a definition of "educational benefit." And so is it -- and then having looked at the legislative history -- and I get you say that I don't

have to, and I understand that argument. But if I get to the legislative history and the examples that it includes, doesn't it suggest that your interpretation is wrong?

MR. FARRELL: I don't think so, your Honor, --

THE COURT: Okay.

MR. FARRELL: -- because the legislative history piece here, first of all, it relates to the 1990 amendment, not to the 2005 amendment that we're talking about, --

THE COURT: Okay.

MR. FARRELL: -- number one. Number two, it is a comment from a United States Attorney, a non-legislator. The Supreme Court has --

THE COURT: And my guess is a non-bankruptcy lawyer.

MR. FARRELL: Well, I suspect that's right.

THE COURT: Yeah.

MR. FARRELL: And the Supreme Court has told us that to the extent you're going to get into a legislative history at all, comments from non-legislators are even less important.

THE COURT: Certainly. My point being, if we -- if your argument is that this is so clear that the common, everyday person would understand what it means, and here is -- if I take a U. S. Attorney as a common, everyday person not schooled in bankruptcy, you know, according to you, he got it way wrong. And why isn't that sort of the quintessential drawing the box around and saying if it's subject to reasonable

multiple interpretations, that it is ambiguous and I've got to go figure it out?

MR. FARRELL: Yeah, it's not so much that he got it wrong, your Honor, but he was addressing a different issue. He was addressing the issue of whether an overpayment on a conditional stipend or grant was covered by the existing language or not.

THE COURT: Okay.

MR. FARRELL: He was addressing that point. The legislators then decided to put this in section -- into the statute, which in our view has broader force and broader impact than the issue that the U. S. Attorney was raising, which goes to the fundamental point of what a -- you know, the fact that that may have been his agenda when he was addressing the congressional committee, you know, addressed his little point.

THE COURT: THE COURT: Fair enough.

MR. FARRELL: It doesn't go to the broader force of the statute. And when you apply the broader force of the statute in -- under the Plaintiffs' interpretation, an obligation to repay funds doesn't include a loan. I think if we took ten people off the street and said, you've got a loan, is that an obligation to repay funds, you're going to get ten out of ten, you bet you.

THE COURT: Right.

MR. FARRELL: So that's our --

THE COURT: No, I got that.

MR. FARRELL: -- starting point.

THE COURT: All right.

MR. FARRELL: Our second point is, it's got to be an obligation to repay funds received as an educational benefit. We think that's established in the record. Each of these promissory notes recites that it is for educational purposes. In fact, each of the promissory notes, the Plaintiff represents that I'm only going to use the loan for that purpose, --

THE COURT: Right.

MR. FARRELL: -- and if I use it for some other purpose, I'm going to give it back.

THE COURT: And so let me ask you. In your view of the world, is you're telling me that "educational benefit," the focus is on the fact that you're going to school, if you will, and getting education versus a "if I have a job, I get a health benefit and I could have an educational benefit." I remember, you know, when I -- my first job, you know, my employer would pay 80 percent, you know, of my tuition for going back to school. And so in that case, "educational benefit" meant part of my compensation package, not what I was receiving from the institution. Is that --

MR. FARRELL: And --

THE COURT: -- was that clear enough?

MR. FARRELL: Yes, and --

THE COURT: Okay.

MR. FARRELL: -- we think the statute's broad enough to cover both.

THE COURT: You think it covers both, okay. I did not pick that up from your papers. Got it, okay.

MR. FARRELL: To the extent that -- I mean, obviously there has to be in the case of the employer paying 80 percent of your education, to the extent, you know, you then quit your job and have to pay it back, that's when it gets picked up by the statute.

THE COURT: Right, okay.

MR. FARRELL: Because in that sense, it's an obligation to repay an educational benefit. So we think the statute's broad enough to cover both. You know, and of course the other side's going to say, well, we've proven too much because if our reading of this subsection is correct, then it subsumes all the other subsections and it renders all of the rest of them superfluous.

THE COURT: Right.

MR. FARRELL: And, first of all, we don't think that that's legally an appropriate analysis. The Supreme Court, in the *Huskey* case and other cases, have said, you know, that's not the proper way to interpret the statute. The legislature often does a belt, suspenders, you know, catch all, has multiple sections that sometimes overlap. And overlapping

statutes, overlapping subsections doesn't --

THE COURT: Isn't necessarily bad.

MR. FARRELL: Isn't necessarily bad. And, number two, it's not entirely superfluous. There are examples of situations where one of these other subsections would pick up a student loan, whereas (8)(A)(ii) that we're relying on would not. And the prime example of that, we've cited a case in our papers, is the *Willis* case. The *Willis* case, the grandfather makes -- takes out a loan that is qualified under (b), which is the section we're not relying on because it's a qualified educational loan to a Title Four institution.

THE COURT: Right.

MR. FARRELL: Grandson quits school so grandfather then has to pay it back. Well, grandfather didn't get an educational benefit --

THE COURT: Right.

MR. FARRELL: -- so it's not covered under (8)(A)(ii) but it is covered under (8)(A)(B). So there's not -- it's not accurate that there is a complete overlap here in the sense that our interpretation of (8)(A)(ii) would render the other sections superfluous.

I do -- given the -- our comments at the beginning about sort of making a record here that's as complete as possible, --

THE COURT: Sure.

MR. FARRELL: -- I do want to talk about the factual underpinnings for our case and make sure the record is clear on what we were saying is sufficient summary judgment evidence from our standpoint in order to tee up this question as cleanly as possible. And the first is the promissory notes themselves, as I think I already mentioned. In that regard, the reason that's so significant and we say dispositive, we cite the *Murphy* case, the Fifth Circuit case, which is in a slightly different context. But it establishes the notion that it is the purpose of the loan, not its actual use, not things that happened after the loan --

THE COURT: Right.

MR. FARRELL: -- that is dispositive for this purpose.

THE COURT: You can't go escape the liability by doing something yourself, I got that.

MR. FARRELL: Right, you can't enter into an educational loan, then go spend it on drugs and drinking and then say all of a sudden it's -- and that's in fact the exact example the Fifth Circuit uses.

THE COURT: Right.

MR. FARRELL: So the key here is the purpose of the loan. And the purpose of the loan here in each case for Mr. Shahbazi and for Mr. Haas is established by the loan documents themselves. And we've cited the exact provisions,

but they're very clear that this is for educational purposes, if we use it for something other than educational purposes, we're in essence not authorized to and any portion that's not used for educational purposes we'll immediately repay. So we think the loan documents themselves establish that. Then we --

THE COURT: So if there is a recognition that, you know, I'm borrowing -- I'm making this up. I'm borrowing $6,000 for the semester. My tuition is $2,300. And the balance are for my books, for my rent, for food, for gas in my car -- because a lot of those loans contemplate sort of the package of being able to attend. Is there a bifurcation that occurs or is it all if -- once -- if it enables me to go to school, it's covered as well under your theory?

MR. FARRELL: Your Honor, under some of the loan programs, that issue gets dealt with because cost of attendance is a defined term under some of the Federal loan programs and some of the qualified loan programs. And so the school actually certifies what the cost of attendance is. And by its definition, it sometimes includes or it often includes not just tuition, room and board, but some of these --

THE COURT: Other stuff, right.

MR. FARRELL: -- miscellaneous additional things that you're talking about.

THE COURT: Right.

MR. FARRELL: In the situation of an educational loan

covered by the statute where there is not a certification by the school as to the cost of attendance, I'm going to kind of glance over here at my colleague here to make sure I'm not misstating something, but I think we take the position in that position that the -- as long as part of the purpose is for educational, then the entire loan is covered by the statute.

THE COURT: Okay, thank you.

MR. FARRELL: Especially in the face of a -- where we in essence protected ourselves against that possibility by requiring a representation by the borrower that they're not going to use it for a purpose that goes beyond educational benefit.

THE COURT: Okay.

MR. FARRELL: In other words, we basically said if you take this money, you don't use it for what you're supposed to do, you know, all bets are off, you have to immediately give it back.

THE COURT: But -- and I'm not sure we want to go down this path today. But these folks all know that the loans are extending to these folks is that they are being used to pay rent and to buy food and to do all those other things. So, I mean, I don't think that you -- I mean, it would seem odd to me that you could contract away something that you already know.

MR. FARRELL: No, I --

THE COURT: I mean, I --

MR. FARRELL: -- you may have misunderstood what I was saying, your Honor. To the extent it is the person is in school and they're using it for some of these ancillary things, --

THE COURT: Sure.

MR. FARRELL: -- that's part of cost of attendance. My point was if they, you know, take it and quit school or that, you know, the day they get the proceeds, they don't -- you know, they cancel their enrollment --

THE COURT: I misunderstood. I thought you --

MR. FARRELL: -- and they run off to Belize, --

THE COURT: -- were saying if there wasn't a provision, then this is how it goes.

MR. FARRELL: Yes, your Honor.

THE COURT: Okay, all right, got it.

MR. FARRELL: And then just to sort of create the -- or complete the factual record, then we have in each case, Mr. Haas and Mr. Shahbazi, we have their bankruptcy schedules which lists these as educational student loans. And then in each case, we have an interrogatory answer and a request for admission where they basically concede that these were educational loans taken for educational purposes and used for those purposes. We think with that factual record, there is no additional discovery that's necessary. We have basically the -- all the facts necessary are essentially undisputed in the

record, and it does then come down to a pure interpretation of the statute.

THE COURT: All right, so the fact that the schedules say it's an educational loan, you think that in and of itself is sufficient for purposes of summary judgment.

MR. FARRELL: I'm not sure it's in and of itself, but when you add it with the terms of the promissory note and it is part of the -- it's just confirmatory when you add it to the promissory note terms and to the admissions response and the interrogatory responses.

THE COURT: Okay, all right.

MR. FARRELL: Your Honor, the rest of what I would say in terms of the -- you know, how the various courts have gone off on the statutory interpretation, you know, that really is two starkly different approaches. They're both out there. There's not a whole lot of mystery about which way the courts went. And we just happen to think that the ones that went our way are correct --

THE COURT: I got it.

MR. FARRELL: -- when you start from the premise of how clear we think the statute is itself.

THE COURT: So you think I read the words and I need to go no further than the words themselves.

MR. FARRELL: I think that's right. And I do want to address one other point though that the other side raises in

their response, and that is that Navient has internal policies and some investor materials that they say are inconsistent with our current interpretation of the statute.

THE COURT: Yeah, I get that argument. It doesn't matter if they're wrong too is where you came out.

MR. FARRELL: Yeah.

THE COURT: It may be an issue for later if it lives that long. But for purposes of determining what it is, doesn't really matter what they think, doesn't really matter what the individuals think, right?

MR. FARRELL: Well, and --

THE COURT: It either is or it isn't.

MR. FARRELL: That's our position. It's --

THE COURT: Yeah, I got it.

MR. FARRELL: -- the law is the law and it's for a court to tell us what it means. And I've got -- you know, if we get this far, I've got an explanation for the policies and procedures. But I don't think it matters for the purposes of this motion the way we've asserted it.

THE COURT: Yeah, I -- actually I agree with you. I got it. It's -- the words are either plain on their face or I have to go look at other things to determine what the words mean. But what someone else thinks it means is irrelevant to what we're doing today. I totally concur.

MR. FARRELL: So with that, your Honor, you know,

without beating a dead horse, I mean, it really is pretty simple from our standpoint. The words are clear. Their -- under their interpretation, an educational -- excuse me, an obligation to repay funds is not broad enough to encompass a loan. We just think that makes no sense. We think the courts that have gone the other direction have simply gotten it wrong. The -- this canon of construction that says, you know, you've got to interpret words by the company they keep, --

THE COURT: Right.

MR. FARRELL: -- the Supreme Court has said, yeah, that can in certain circumstances be an appropriate canon of construction. But what you can't do is take, you know, two or three words out of the middle of a statute and apply it. You've got to apply that doctrine to the extent you even get there, which we don't think you do, but to the extent you can get there based on the entire statute.

THE COURT: Yeah, I get that. I think Justice Scalia, who was a big user of a lot of those, I think he also said that not everyone applies every time.

MR. FARRELL: Right.

THE COURT: And you use those things that help you get to a sensical result. I totally agree.

MR. FARRELL: And, again, I've already made the point that we don't think being superfluous, superfluity, matters here, and it's not entirely -- it doesn't render the other

sections superfluous so --

THE COURT: I got it. All right, thank you.

MR. FARRELL: Thank you, your Honor.

THE COURT: All right, response?

MR. BURGE: Thank you very much, your Honor. I'll skip over -- I was going to talk a little bit about sort of how we got here today. The one thing I will say about this question of whether the policies apply, I'll just hit this quickly, is we did take a 30(b)(6) deposition of Navient in this case. And they recognize that under their policies, Michael Shahbazi's loan, one of the class reps, would have been discharged but for a data processing error. So their own internal policies I would say agree with our interpretation of the statute. There are just mistakes that affect some significant portion of this class that have led to them collecting from a lot of people who, but for those mistakes, they wouldn't be collecting from. And their response to that is, you know, to take this litigation position and refuse to correct those data processing errors. It's really shocking to us.

THE COURT: Right.

MR. BURGE: We're here then the two issues, I'm just going to cover jurisdiction very briefly because I think your Honor is in agreement with me on this, just to create a record. We think this is resolved by the *National Gypsum* case, *Cano*,

Lonnie Davis, and *Jones*. *National Gypsum* recognizes that the 524 injunction creates a substantive right. It can be asserted through a declaratory judgment action. *Cano* and *Jones*, the recent decision of Judge Bohm, recognize that you have jurisdiction under that -- over that under 1334 arising-under jurisdiction. The *Waffenschmidt* case is interesting for case specific injunctions, but I think Judge Isgur correctly analyzed it in the *Lonnie Davis* case where he said we're not talking about a case-specific injunction here, we're talking about a statutory injunction, and the kind of concerns you would have if you had done a case specific injunction as in *Waffenschmidt* simply don't apply when you're considering a statutory injunction.

And I do think your point, which I take and I will make sure we are careful about the distinction in the future between the order signed by the judge and the injunction created by the statute, I think is exactly right. The fact that a judge in Virginia signed the order of discharge rather than a judge in Houston doesn't really matter because the injunction's exactly the same.

And for Shahbazi's case, he lives here in Houston. You have personal jurisdiction over him. He ought to be able to bring that declaratory judgment action in the place where he is. And finally, I guess just as a little side note on that, you know, we're bringing a nationwide class action here hoping

to represent people throughout the entire country. It makes sense to us that we would want class reps from across the country.

So turning to a statutory interpretation question which I think is the -- really the main legal issue on the merits of this case, I suppose to keep the record, I'll go through the entire statutory interpretation argument, because there's a lot of ones here and I think somebody -- each person on my team has their own favorite, but I'll see how many I can cover. I think we should start with the whole statute. I think, you know, Tom made the point you have to look at the entire statute, so let's do that. If you look at 523(a)(8), there are three distinct provisions. It's pretty carefully crafted. You have the first provision which covers loans that are funded by a nonprofit or guaranteed by the government. You have the second provision that covers obligations to repay funds received as a benefit, scholarship, or stipend. And you have a third provision which covers qualified education loans. And I think it's interesting you had a whole back and forth with him about cost of attendance and what's in the cost of attendance and what's not in the cost of attendance. There's extensive regulations that govern how we calculate the cost of attendance and what's included. And the argument Navient's making here, that the second section of this statute covers all private loans if they have any educational purpose whatsoever,

swallows that entire statute. Why have all those regulations about qualified education loans if all of it's covered by two anyway?

I think if we drill down to the specific section that Navient wants to talk to, the obligation to repay funds received as an educational benefit, scholarship, or stipend, and we look at that word "benefit," "benefit" has two possible meanings. It can be -- it's not defined in the statute. And if you go to the dictionary, it can mean an advantage or profit gained from something, or it can mean a payment by an employer, insurance company, or statute. I think either of the two possible meanings could fit there; although for reasons I'll explain in a second, the second I think is clearly the right one. But because it has those two meanings, it is ambiguous. You have to decide which of those meanings Congress intended. They didn't intend both.

I think you start with the canon that words in a list should be defined together. This is explained in the *Essangui* opinion. You've got benefits, scholarship, and stipend. Scholarship and stipend are both conditional payments that you might have to repay if you don't meet the condition. It makes sense that benefit, one of the definitions of "benefit," a payment by an employer, is a similarly conditional obligation. It fits with the list, so that canon of -- there's two different ways to pronounce that. I'll call it *noscitur a*

sociis. That is -- I think plainly applies there. You have the canon against superfluidity. You've got two possible definitions here, one of them swallows the entire section. The other one makes the second section distinct from the other two. I think that's sensible. I think one important thing to look at here is look at the grammar of that clause. It's "funds received as an educational benefit," --

THE COURT: As opposed to for.

MR. BURGE: -- not for.

THE COURT: Yeah, I got that.

MR. BURGE: And I think if you listen carefully to Tom, he said about ten times they used these funds for an educational purpose. He can't even bring himself to say they used these funds as an educational purpose --

THE COURT: Yeah.

MR. BURGE: -- because it doesn't make sense, you don't talk that way.

THE COURT: Let's not pick on Mr. Farrell.

MR. BURGE: I'm not trying to. He's doing the best -- you know. So, and then finally, I think if you look at the statute, you'll see that the word "loan" is specifically used in the first section and the third section. You know, Congress knew how to use the word "loan." They didn't use "loan" in the second section. I think it boggles the mind to think that the one section they didn't include "loan" in is the one that

actually includes every possible loan, not the two sections that define specific types of loans that are exempt.

THE COURT: But don't you agree that "obligation" is actually broader than "loan?"

MR. BURGE: Oh, I would agree with that.

THE COURT: Okay.

MR. BURGE: And I think that was intentional. The -- Congress meant to cover any kind of employment benefit, you know, scholarship, or stipend that somebody might have to repay as a conditional grant. They didn't want to have any confusion about if you're getting a scholarship and you have to repay it, it's covered. So obligation to repay funds, make sure we're being really broad. But then they immediately limited it "received as" an educational benefit, scholarship, or stipend.

THE COURT: Okay.

MR. BURGE: I think if you look at the legislative history -- one thing I think is kind of interesting here, we obviously have a legislative history that we pointed to you. Tom responds that that was a U. S. Attorney, not a member of Congress. But what I took from their legislative history, we think some of it they take out of context. But the main point they make is just the general statement that over time, Congress has always expanded the exception to dischargeability. And I think that is true as far as it goes. But if you look at the specific 2005 amendments, they added all of this language

about qualified educational loans in that third section. That was the big increase in the exemption of dischargeability added in 2005. And I think you would surprise everybody in Congress to learn that adding qualified educational loans was irrelevant because all of those qualified educational loans were already exempt from non-dischargeability in the second section. I think that third section which they added in 2005, they thought they were doing -- you know, greatly expanding the private student loans that were covered, they didn't think that what they were adding there in that third section was irrelevant, it was already covered by the second section.

Now, we talked a little bit about counting cases. You know, I think we have the majority, 19 to 17. I don't think it really matters because the truth is, the recent cases, the ones in which all of these arguments have aired, I think as we explained in our brief have largely gone in favor of us. And I think if you take a look at the cases they cite, the older cases, I think *Shaw* is a fine example. To the extent the courts address these issues, they really do it as dicta. *Shaw* was a case here in the Southern District of Texas that was largely about undue hardship and whether a loan taken out before 2005 should be interpreted under this version or the prior version of the statute. The -- everybody in *Shaw* acknowledged that the loan was covered by all three of these sections of 523(a)(8). It was funded by a nonprofit, it was a

qualified education loan. So the fact that the court also found that it was an educational benefit, I suspect that argument wasn't even briefed. It's definitely dicta. There's no analysis there whatsoever. The idea that that is a considered, you know, ruling on this issue I think is just wrong.

We actually have a more recent case that wasn't even -- you know, it was decided since we submitted the briefs on this, the *Wiley* decision that I have a copy of for Tom and one for the Court. It's *In Re Wiley*, 579 B.R. 1 from the District Court of Maine. Hand you a copy of that.

THE COURT: Thank you.

MR. BURGE: It analyzes a lot of these same issues and rules in our favor as well. And, you know, these decisions keep coming out. I think it -- I agree with you, your Honor, it'd be helpful to have some direction from some higher courts. The highest court that's put out a published opinion on this is the Ninth Circuit Bankruptcy Appellate Panel in *Kashikar* which we agree with that, but that's, you know, one bankruptcy appellate panel of the Ninth Circuit. It would be helpful to have some more direction on this.

THE COURT: Agreed.

MR. BURGE: One other kind of minor point. There's an argument made by Navient that the way you can understand this -- you know, this second section doesn't swallow the whole

statute is that with the second section, you have to actually receive the funds. And that's not the way the first and the third section works. That's not actually the way Navient interprets the statute; because if that was the way you interpreted the statute, the cosigners would be able to get out of these loans in bankruptcy because the cosigners never receive the funds. But that's not the way that Navient has interpreted the statute. They say nobody gets out in bankruptcy.

Finally, on the factual issue, just to preserve the record, we've submitted that investor presentation where I think Navient represents to investors that most of their private student loans are not dischargeable in bankruptcy, but the career training loans here are dischargeable in bankruptcy. That's in the record at Document 100-9. Exhibit 3 to our motion is Navient's internal policies which make clear that when they're deciding whether a loan is subject to bankruptcy, the policies they've developed are do they get a 1098, is it a qualified education loan; if not, is it a non-Title Four school? If it's a non-Title Four school, it should be considered discharged and the loan should be written off. That's completely consistent with our interpretation of the statute that we're arguing right here.

Finally, on that question about the promissory notes and the fact that there's a reference to the educational

purpose in the promissory notes, that is relevant when you're talking about a loan that is guaranteed by the government or funded by a nonprofit, because obviously the Federal government issues all kinds of loans and you have to have some way of determining whether a Federal government loan is covered in 523(a)(8) or not. And for that you look at the educational purpose. That doesn't speak to this educational benefit question particularly under our definition of "benefit." And with that, I think -- we think this motion for summary judgment should be denied.

THE COURT: All right, thank you.

MR. BURGE: Thank you, your Honor.

THE COURT: Mr. Farrell, I will give you last word.

MR. FARRELL: Your Honor, I'm going to leave it pretty much where it is. The Court has the cases, the Court can read the cases better than we can. And so you -- the argument's out there. I just can't help but note one thing, though. At one point the argument is that our interpretation is so outlandish it "boggles the mind." On the other hand, there's a concession on the other side that the statute is hopelessly ambiguous and that in order for it to be ambiguous, as they say in their brief, there's got to be two reasonable interpretations. So you can't have it both ways.

THE COURT: I got it.

MR. FARRELL: And, you know, the main argument is, as

the Court indicated, an obligation to repay is broader than and includes by definition and common, everyday parlance a loan.

THE COURT: All right.

MR. FARRELL: Thank you, your Honor.

THE COURT: Thank you. Folks, I am -- I will issue something in writing on this, again given the statements that you're going to seek or you're going to seek immediate review of an adverse order. What I will do is just to try to expedite the process, in the written order I will make a recommendation for a direct appeal to the circuit so that you don't get caught up in the climb from the district court to the appellate court. My inclination is to still deal with the stay issue the way I described. I don't know what the right amount of time is but I will try to look at some prior direct appeals to figure out what makes sense for everybody, and that way it'll be a balance between trying to move everything forward and trying to not just stop it. But I do think under any circumstances, we're not going to have -- I think the certification hearing is probably off. I think in part what we do with it will depend upon how quickly I can get this done and how quickly we can get someone's attention at the circuit.

MR. FARRELL: Yeah.

THE COURT: Does that all make sense?

MR. FARRELL: It does, your Honor. Under the current scheduling order, there's actually not a hearing date for the

certification. There's a date by which the last briefs have to be done. And then I think we were going to have a status conference and actually set a hearing.

THE COURT: Oh, that's right. I totally -- I interlineated that in, didn't I? Or I did something. Anyway, so --

MR. FARRELL: So right now the -- I think the last brief is due May something.

THE COURT: My sense --

MR. BURGE: The last brief's due May 5th.

THE COURT: My sense of it is, is that we ought to go ahead and finish that. But if you all feel differently, I'm happy to hear it. I just don't think we can start the hearing until the issue is resolved.

MR. FARRELL: Yeah, from our perspective, your Honor, part of the reason of doing this was to try and obviously get final resolution or as close to final --

THE COURT: No, sure.

MR. FARRELL: -- resolution of the statutory interpretation as we can and, frankly, to cut off the expense and the --

THE COURT: But what's left to be done, other than the briefing?

MR. FARRELL: Well, so we've got the --

THE COURT: Because you're billing, what, like 150,

175 an hour now?

MR. FARRELL: Little bit more than that but --

THE COURT: Yeah.

MR. FARRELL: -- in that range. There's a difference between what I bill and what they pay so --

THE COURT: Oh, fair.

MR. FARRELL: We have expert reports on our side due in a couple of weeks, and then we have briefing and we have -- they've -- I think you've taken all the depositions you want at this point, but we still have the four class reps to depose. So there's a fair amount of additional activity --

THE COURT: And so what are you proposing? Are you proposing that it -- we stay it immediately, or do you want to take those four depos and then stay it? What are you contemplating?

MR. FARRELL: My preference, your Honor, would be to -- and, again, I -- it does sort of depend on when you think you're going to get an opinion out. And that was not a --

THE COURT: No, no, I got it.

MR. FARRELL: -- I'm not trying to -- I'm not fishing for anything, I'm just saying. But my preference would be to kind of put everything on hold until you get an opinion out, and then you decide in there what additional time period of a stay you have in mind, and then we go from there.

THE COURT: Let me -- can I -- I get the argument,

with the exception of taking the four class reps. Why wouldn't you want that memorialized?

MR. FARRELL: Well, I'm actually happy to do that. It -- that's not a big deal. We do have -- you know, we've got --

THE COURT: Are they scheduled?

MR. FARRELL: No. We've asked for dates and we're working on coordinating dates.

MR. BURGE: I suspect they'll all be set within the last two weeks of March.

THE COURT: My thought, unless anyone wants to argue strongly against it, my thought is you take the four class reps so that we get that memorialized. And then I'm assuming at that point you can brief from everything that you've gotten done once we start that back up. Is that a fair assumption?

MR. BURGE: I mean, I think that, you know, obviously we're -- we've been working on the briefs and we're in a position to be able to brief this so I think --

THE COURT: Sure.

MR. BURGE: -- we'd be perfectly happy to move forward with briefing now and have all that done so that whenever we come back down, we submit it. But it may be that there's something in your order or in the Fifth Circuit's order that's helpful in terms of the briefing so --

THE COURT: Right, so --

MR. BURGE: -- I mean it could make sense.

THE COURT: I think --

MR. BURGE: Rather than have to do a whole nother set of briefs that respond to whatever has happened.

THE COURT: I'm going to get your note.

MR. BURGE: And there are a few outstanding issues that we've been going back and forth on just in terms of discovery. They sent a letter to us asking for some things. We've sent some letters to them. So we may be able to resolve that now kind of in keeping with the class members' depositions.

THE COURT: And can you just -- and I don't want to get into the argument, but what are we talking about?

MR. BURGE: Sure, there's some privileged documents that we want them to produce. They either argue they have produced them or that they're properly privileged. So we might fight about that. And then there could be some discovery into -- and those privileges have to do with sort of how their policies are created.

THE COURT: What I would like you all to do is see if you can't craft an agreed-order that, one, will have the four class rep depos proceed. If there are discreet issues that you want to have resolved, i.e., we can't get a privilege list that reflects the date of the correspondence or, you know, something like that, carve those out and then stay everything else

pending further order. Do you think you all can craft through that?

MR. FARRELL: I think so. I don't want to lay behind the log on an issue, though, because the -- our expert reports are still out there, too, and we would prefer to put those in the --

THE COURT: Well, no, --

MR. FARRELL: -- hold category.

THE COURT: -- that -- to me, that would just get stayed.

MR. FARRELL: Yeah.

THE COURT: But if there are some things that are sort of midstream, i.e., you know, you gave me page one and three of a document and we're fighting over page two then, you know, let's tee that up and get that done.

MR. BURGE: Yeah, agreed.

MR. FARRELL: I doubt very seriously we're going to be back before you on any of those kind of issues, --

THE COURT: All right.

MR. FARRELL: -- but I'm happy to carve them out if we need to.

THE COURT: Sure. And but if you could do that. If you cannot reach a consensus on what that order ought to say -- and all I'm asking you to do, you're waiving those substantive objections, you're simply implementing my instruction. If you

cannot get that resolved, then call Mr. Alonzo. I don't need a motion, just call Mr. Alonzo and I'll set an emergency hearing. You can each bring your form of order. Hopefully by then I will have moved this along. I hope -- I just -- you know, I got behind last summer when I went back to Duke and finished up. And I've gotten everything down to where I'm two behind. I'm working on one. I'm going to stop that and do this, so hopefully I can get this done reasonably quickly and we'll -- I'll do my best.

MR. FARRELL: Great.

THE COURT: All right?

MR. BURGE: Absolutely.

THE COURT: Anything else this afternoon?

MR. FARRELL: Nothing further from the Defendants.

THE COURT: Really appreciate the argument, thank you all.

MR. BURGE: (Indisc.) the Plaintiffs. Thank you, your Honor.

MR. FARRELL: Thank you, your Honor.

THE COURT: Thank you.

(This proceeding was adjourned at 4:20 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Signed **March 8, 2018**

Dated

TONI HUDSON, TRANSCRIBER